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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN J. TAVONE,

Petitioner,

v.

STATE OF RHODE ISLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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January, 1985

QUESTIONS PRESENTED

1. Whether the seizure from a theatre, pursuant to a warrant, of a feature-length film claimed to be obscene violated petitioner's rights under the First, Fourth and Fourteenth Amendments because the magistrate, who could have easily viewed the film firsthand, instead relied on a policeman's affidavit, which briefly summarized only selected scenes from the film and did not describe its plot, theme or characterization?

2. Whether petitioner's conviction for exhibiting an obscene motion picture violated the Due Process Clause because the town, knowing he advertised and exhibited similar films, had renewed his theatre license each month for six years, thereby affirmatively leading him to rely on these monthly renewals as an assurance that his conduct was lawful?

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Petitioner John J. Tavone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Rhode Island entered in this proceeding on September 20, 1984.

OPINION BELOW

The opinion of the Supreme Court of Rhode Island, which is presently unreported, is reprinted in Appendix A.

No opinion was rendered by the Superior Court, Kent County, Rhode Island.

JURISDICTION

The judgment of the Supreme Court of Rhode Island, affirming the Superior Court's judgment of conviction, was entered on September 20, 1984. A timely petition for rehearing was denied on November 21, 1984. The order on rehearing is reprinted in Appendix B. This petition for certiorari is filed within 60 days of the date of that order in compliance with Rule 20.1 and 20.4. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), petitioner asserting deprivation of his rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech ....

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

United States Constitution, Amendment XIV:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

Section 5-22-5, General Laws of Rhode Island 1956 (1976 Reenactment): Local licensing of amusements — Prohibition of obscene shows and performances:

> Any town council, the board of police commissioners, or in the case of the city of Providence, the bureau of licenses, or any other licensing board or authority in any city or town may require a license for any place within its respective city or town at which any such performances, shows, exhibitions, public roller skating, dances or balls are presented or conducted for any term not exceeding one (1) year, and may deny, revoke or refuse to renew any such license only upon the ground that the said place presents a danger to the public health or safety.
>
> Any town council, the board of police commissioners, or in the case of the city of Providence, the bureau of licenses, or any other licensing board or authority in any city or town may require a license for each particular performance, show or exhibition but may deny any such license only upon the ground that the said performance, show, or exhibition is obscene.
>
> In the event that any person, firm, corporation or association shall apply for a license for any particular performance, show or exhibition and the town council, the board of police commissioners or in the case of the city of Providence, the bureau of licenses, or any other licensing board or authority in any city or town to which said application is directed is of the opinion that the said license should not be granted on the ground that the said performance, show or exhibition is obscene, the said town council, the board of police commissioners, or in the case of the city of Providence, the said bureau of licenses or the said licensing board or authority shall within forty-eight (48) hours of the filing of such application, either grant the license sought or commence a suit against the said person, firm, corporation or association in

the superior court for Providence and Bristol counties by the filing of a complaint wherein shall be contained prayers that the said performance, show or exhibition be adjudged obscene and that the said person, firm, corporation or association shall be notified by the clerk of said court of its pendency. The said matter shall then be heard by a justice of the said court on the question of whether or not the said performance show or exhibition is obscene within one (1) day of the joinder of issue and the said justice shall render a decision within forty-eight (48) hours of the conclusion of the said hearing. The superior court shall give preference to such cases over all other cases in said court except older cases of like nature, and such cases shall be assignable to any calendar in the said court. In determining the time periods heretofore set forth in this section Saturdays, Sundays and court holidays shall not be counted and the superior court shall not be required to hear such cases on said days. Throughout the said proceedings, the party initiating the same shall have the burden of proof, and if any of the provisions of this paragraph have not been strictly complied with either by the party initiating the proceeding or the court, the said license shall be issued forthwith.

STATEMENT OF THE CASE

Petitioner was indicted on three counts of knowingly promoting for commerical gain two obscene motion pictures in violation of section 11-31-1 of the General Laws of Rhode Island 1956 (1969 Reenactment).

On February 20, 1981, the date of the alleged offenses, petitioner was owner and operator of the Palace Theatre in the Town of West Warwick, Rhode Island. The theatre had been continuously advertising and exhibiting X-rated motion pictures for the previous six years pursuant to a license issued and renewed each month* by the West Warwick Town Council, under the authority of section 5-22-5 of the General Laws of Rhode

* A copy of the license for the month of February, 1981 appears in Appendix D.

Island. That statute also authorized the town council to deny, revoke or refuse to renew any such license. The town could deny a license "only upon the ground that the said performance, show, or exhibition is obscene." R.I.G.L. § 5-22-5.

On Februrary 20, 1981, after ascertaining from newspaper advertisements what films were to be shown at the Palace that evening, two members of the Rhode Island State Police visited the theatre and saw two feature-length motion pictures, which consumed two hours and 32 minutes. (Tr. 98; Affidavit in Support of Search Warrant.)* After the viewing, one of the policemen secured a search warrant on the strength of the officer's affidavit purporting to describe the contents of the films. The police officer's entire description of "Baby Blue" — the motion picture which petitioner was ultimately convicted for exhibiting — consisted of ten simple sentences. The affidavit attempted to describe only two scenes, out of the entire motion picture, in any kind of detail and then simply declared that the affiant had viewed many other scenes in the film portraying similar conduct. The motion picture's plot, theme and characterization were ignored. The police officer's description of "Maraschino Cherry" — which the jury found not to be obscene — consisted of just twelve sentences.

The following evening the police officers returned to the Palace Theatre with the warrant, saw a portion of the film being exhibited, verified that it was one they had seen the night before, and seized the two motion pictures (Tr. 99-100). Petitioner was subsequently arrested and charged with exhibiting obscene films.

Prior to trial petitioner moved to dismiss the indictment on the grounds that he had relied upon the issuance and monthly renewal of the license by the West Warwick Town Council as an official assurance that the showing of the films in question was conduct for which he could not be criminally prosecuted (Tr. 20, 56). He also moved to suppress the films on the grounds

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* Numerals preceded by "Tr." refer to the transcript of proceedings in the trial court. The Affidavit in Support of Search Warrant is reprinted in Appendix D.

that no judicial officer had viewed the films prior to their seizure and that the police officer's sparse affidavit did not set forth sufficient facts to furnish probable cause for the issuance of the search warrant (Tr. 7). Both motions were denied (Tr. 19-20, 56).

On December 11, 1981 a jury acquitted petitioner on two counts (two showings of "Maraschino Cherry"), but found him guilty on one count (one showing of "Baby Blue"). Petitioner was sentenced on February 1, 1982 to the maximum term of two years in prison.

The Rhode Island Supreme Court's Split Decision

On appeal to the Supreme Court of Rhode Island, petitioner's conviction was affirmed by a narrow three-to-two vote. The majority held that the monthly license issued by the town council was not a license to exhibit the specific films for which petitioner was indicted; it was nothing more than a general license to exhibit films. (A 5*) Consequently, petitioner's reliance on these monthly licenses as an official assurance that his conduct was lawful was "sorely misplaced." (A 5) The dissenters, conceding the license was not a license to show the specific motion pictures in question, nevertheless agreed with petitioner that the month-after-month license renewals — when the town council knew petitioner was showing X-rated movies — "affirmatively misle[d] defendant to believe that his conduct in showing X-rated films met with the approval of the town council." (A 11)

The court also held that petitioner's motion to suppress the films was properly denied. Characterizing the length of the films as "relatively short," the court found that the police officer's affidavit was specific and detailed enough to allow the magistrate to "focus searchingly upon the question of obscenity." (A 8-10)

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* Numerals preceded by "A" refer to pages of the appendix at the rear of this petition.

Reasons for Granting The Writ

I

The seizure from a theatre, pursuant to a warrant, of a feature-length film claimed to be obscene violated petitioner's rights under the First, Fourth and Fourteenth Amendments because the magistrate, who could have easily viewed the film firsthand, instead relied on a policeman's affidavit, which briefly summarized only selected scenes from the film and did not describe its plot, theme or characterization.

This is the first case to reach this Court which squarely presents the question expressly left open in *Lee Art Theatre v. Virginia*, 392 U.S. 636, 637 (1968), regarding whether a magistrate must view a motion picture claimed to be obscene before issuing a warrant authorizing its seizure. The facts of this case dramatically demonstrate how — in the absence of such a requirement — important First Amendment protections vanish and our right to freedom of expression is placed in the hands of the police.

The two motion pictures seized in this case were neither 5-minute "short subjects" nor films exhibited in "peep show" machines. They were feature-length motion pictures, lasting two hours and 32 minutes.* That is the single, critical fact to be considered in determining whether a policeman's affidavit, purporting to synopsize the motion pictures' contents, comports with the special procedural safeguards required when a search and seizure threatens materials presumptively protected by the First Amendment.

In the instant case the magistrate did not personally view the films before issuing the search warrant. Although this Court has never authorized seizure of a motion picture where a magistrate has not first viewed the film, whether he is required

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* The police officer's affidavit states that the two films ran in succession from 8:18 P.M. until 10:50 P.M. (A15-16) The record is unclear as to the length of each film individually. For purposes of discussion we have assumed that they were of equal length. We are therefore forced to dispute the Rhode Island Supreme Court's characterization of the length of the films as "relatively short." (*See A 10.*)

to do so is said to be an open question. *Lee Art Theatre v. Virginia*, 392 U.S. at 637 ("We need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant"). But in *Heller v. New York*, 413 U.S. 483 (1973), the Court noted that because the magistrate had personally viewed the film, "he had a full opportunity for independent judicial determination of probable cause prior to issuing the search warrant, and was able to 'focus searchingly on the question of obscenity.' " 413 U.S. at 488.* Conversely, then, a police officer's affidavit is a dubious basis for a magistrate's "independent" assessment of a film's obscenity. This is particularly so because a police officer, "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), will understandably focus his attention and affidavit on what is objectionable in a film, not on the motion picture's "literary, artistic, political or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). Thus, a constitutional rule should be forged by this Court, requiring that a magistrate view a film personally before authorizing its seizure — at least where, as here, the movie is easily accessible and there is no need to rely on an affidavit.

At minimum, such a rule should apply to full-length motion pictures. Where the film is a short "loop," a police officer's affidavit which sets forth a specific, detailed description of all the scenes depicted, as well as the plot and theme of the film, may arguable dispense with any requirement that the magistrate view the film prior to issuing the warrant. Where, however, the film is a feature-length motion picture, a police officer's affidavit cannot suffice because it simply cannot effectively convey

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*At least one circuit court has misread *Heller* and declared that "the Supreme Court has specifically stated that the magistrate need *not* view a film before seizing it." *Sovereign News Co. v. United States*, 690 F.2d 569, 575-576 (6th Cir. 1982) (emphasis added). *Heller*, while holding that an *adversary* hearing is not required prior to seizure, in fact reiterated the open question left by *Lee Art Theatre*. 413 U.S. at 488. Moreover, the *Heller* Court's reliance on the fact that the magistrate *had* personally viewed the film suggests, if anything, that such a procedure *is* necessary for an independent determination.

the entire pictorial, narrative and thematic content of the motion picture, which is essential for the magistrate to assess the movie "taken as whole." *Miller v. California*, 413 U.S. at 24. Nor does such a condensed representation permit the magistrate to "focus searchingly on the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961).

Alternately, assuming without conceding that under unusual circumstances a warrant could issue without a magistrate's viewing the feature-length film, this is not such a case. Here the police officer's *entire* description of "Baby Blue" — the motion picture on which Mr. Tavone's conviction was based — consisted of a total of ten simple sentences:

> "The plot revolved around two couples and a young girl and her boyfriend. A scene viewed by your affiant took place on the couch of a house. A male and a female were engaged in various sexual activity. The female performed fellatio on the erect penis of a male. The male then performed cunnilingus on the female and the two then engaged in sexual intercourse which culminated in the male withdrawing his penis from the vagina of the female and ejaculating on her stomach.
>
> "In another scene from Baby Blue your affiant observed two females engaged in homosexual activities. The two females performed cunnilingus on each other on a floor near a fireplace. During the scene the two also engaged in mutual masturbation. This activity took place under the watchful eye of a male character in the film.
>
> "Your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation."

This synopsis, it bears repeating, purports to describe a motion picture which ran for over an *hour!* Surely it is insufficient for the magistrate to determine "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Miller v. California*, 413 U.S. at 24.

The affidavit fails to set forth the motion picture's plot, theme or characterization. (Its assertion that "the plot revolved around two couples and a young girl and her boyfriend" tells the magistrate nothing.) How can a judicial officer gauge the literary, artistic, political or scientific value of a motion picture if nothing about the film's plot, theme and characterization is conveyed to him? Countless legitimate motion pictures would be subject to seizure if *only* those scenes involving sexual activity were described to a magistrate. Obscenity is often separated from constitutionally protected expression "only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). This already elusive line can simply not be fixed by a magistrate who is given a description of only the objectionable portions of a motion picture.

Moreover, the police officer's affidavit attempts to describe only two scenes — out of an entire motion picture — in any kind of detail. His declaration that "your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation" is without value since it is barren of any factual detail. *See Marcus v. Search Warrants*, 367 U.S. 717, 731-732 (1961) (conclusory assertions of a police officer are entitled to no weight). Yet the Rhode Island Supreme Court, adopting the language of *United States v. Middleton*, 599 F.2d 1349, 1359 (5th Cir. 1979), relied on the officer's open-ended declaration to fill the cavernous gaps in the affidavit and made the following inferential leap: "It seems clear that these scenes 'contained successive acts which commonsense dictates would require several minutes to perform and thus would consume a substantial portion of the entire film.' "* (A 10)

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* In *Middleton*, the affidavit described *12* scenes in a 65-minute film. The Fifth Circuit's conclusion that these 12 scenes consumed virtually the entire film time is misapplied to this case where the affidavit described only two scenes. (Petitioner, by noting this distinction, does not thereby endorse the holding of *Middleton*.)

Surely a ten-sentence affidavit, seeking a warrant to seize a full-length novel, would not be sufficient if it merely described, say, Chapters 12 and 21 in some detail and then represented that the balance of the book contained other depictions of sexual acts. Much of the conduct in "Baby Blue" as described in the affidavit could be found in almost any of today's best-selling books, as well as many feature films shown throughout the country in theatres similar to the Palace. Yet an affidavit focusing only on sexual selections from such a book or film would hardly enable a magistrate to assess it "as a whole." So, too, a ten-sentence affidavit is a inadequate basis for judging a feature-length motion picture, particularly where the affidavit fails to describe the narrative and thematic content of the film.

Probable Cause

Although Fourth Amendment rights in recent years have been narrowed by the Court, nevertheless in those cases involving the confiscation of expressive material, the Court has held firm in maintaining broad protections against infringement.* These cases recognize that a separate set of rules have been erected to safeguard First Amendment activity — *see, e.g., Miller v. California, supra; Brandenburg v. Ohio*, 395 U.S. 444 (1969)

**Walter v. United States*, 447 U.S. 649 (1980) (FBI agents' screening of lawfully acquired film was unconstitutional search); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (open-ended warrant and magistrate's active involvement with search requires suppression); *Roaden v. Kentucky*, 413 U.S. 496 (1973) (a higher standard of Fourth Amendment "reasonableness" applies to seizure which has any prior restraint on expression); *Heller v. New York, supra* (seizure of motion picture requires additional safeguards including prompt adversary hearing on issue of obscenity); *Lee Art Theatre, Inc. v. Virginia, supra* (seizure of film based on police officer's determination of obscenity unconstitutional); *Stanford v. Texas*, 379 U.S. 476 (1965) (Fourth Amendment requirement of particularity must be accorded "most scrupulous exactitude" where things seized are books); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) (seizure of allegedly obscene books without judicial investigation and determination that the books are legally obscene does not adequately protect *non-obscene* books); *Marcus v. Search Warrants, supra*, warrants authorizing seizure of "any obscene publications" confers impermissible discretion on law enforcement officials).

— and that Fourth Amendment principles must be cross-referenced to these greater protections. These high standards should not evaporate merely because the determination is one of probable cause rather than a final adjudication of guilt. Where the item seized is a film, the injury to free expression — that is, the actual infringement of speech — occurs when the item is seized. Thus there should be no lowering of First Amendment protection in the probable cause context. If there were, the Court's First Amendment jurisprudence would be meaningless because government, rather than punishing expression, could merely seize it under watered-down First Amendment standards. Such a result is irreconcilable with *Roaden v. Kentucky, supra*, where the Court warned that a search and seizure involving material "presumptively under the protection of the First Amendment" must clear "a higher hurdle in the evaluation of . . . reasonableness" under the Fourth Amendment than similar actions aimed at mere contraband, "because we examine what is 'unreasonable' in the light of the values of freedom of expression." 413 U.S. at 504.

Moreover, the "totality of the circumstances" test for probable cause announced by the Court in *Illinois v. Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983), takes on greater scope in the context of a First Amendment case. Here the totality of the circumstances includes assessing the motion picture "taken as a whole." *Miller v. California.* As Justice Rehnquist observed in *Gates:*

> "An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. . . . Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continuously review the sufficiency of affidavits on which warrants are issued." *Id.* at 2332.

Clearly, in this case, it cannot be said that the affidavit provided the magistrate with a substantial basis for determining that "Baby Blue" — taken as a whole — had no literary, artistic, political or scientific value and was obscene.

In *Walter v. United States, supra*, which held that FBI agents were prohibited from screening a film to examine its contents, even though they had acquired it lawfully, the Court stressed:

> "When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement [of lawful authority to search] be *scrupulously* observed." 447 U.S. at 655 (emphasis added).

Here, the police officer's ten-sentence description was simply an inadequate basis for the magistrate to "scrupulously" observe the requirements of the First and Fourth Amendments.

The "Good-faith Exception" To The Exclusionary Rule Should Not Validate The Search And Seizure In This Case

The "good-faith exception" to the exclusionary rule, *see United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405 (1984), should not validate the search and seizure in this case. Here, unlike in *Leon*, First Amendment as well as Fourth Amendment considerations are implicated. A "good-faith exception" to the exclusionary rule may, arguably, leave Fourth Amendment protections sufficiently intact to justify the exception. The same cannot be said, however, about First Amendment guarantees. In the context of this case, not only must the evidence be excluded in order to deter police officers from conducting seizures on the basis of warrants unsupported by probable cause, but also to deter law enforcement officials from precipitously confiscating publications and films that are presumptively protected by the First Amendment. The law may, perhaps, excuse a policeman for a good-faith seizure of heroin or firearms, but

it cannot permit him equal latitude to seize books and films. State action which may have a chilling effect on protected activities must employ more "sensitive tools" than a state may utilize in other areas. *Speiser v. Randall*, 357 U.S. 513, 525-526 (1957).

Again the Fourth Amendment must "be accorded the most scrupulous exactitude when the 'things' seized are books [and presumably films], and the basis for the seizure is the ideas they contain." *Stanford v. Texas*, 379 U.S. at 485. Thus, whatever dispensations may come out of a "good-faith exception" would, we submit, be inapplicable to this First Amendment case.

This Court should grant certiorari to resolve the question left open in *Lee Art Theatre* by requiring a magistrate to personally view a full-length motion picture, where feasible, before authorizing its seizure. The Court should also grant certiorari to address the scope of the "good-faith exception" to the exclusionary rule in cases involving seizure of First Amendment materials.

II

Petitioner's conviction for exhibiting an obscene motion picture violated the Due Process Clause because the town, knowing he advertised and exhibited similar films, had renewed his theatre license each month for six years, thereby affirmatively leading him to rely on these monthly renewals as an assurance that his conduct was lawful.

Due process requires, as a prerequisite to criminal prosecution, that a person be given "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordon v. DeGeorge*, 341 U.S. 223, 231-232 (1951). This basic requirement is designed to afford a "person of ordinary intelligence a *reasonable* opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (emphasis added). Consequently, when government issues an official assurance or affirmatively misleads a person into believing his conduct is lawful, due process forbids his prosecution for such conduct. *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973); *Cox v. Louisiana*, 379 U.S. 536, 571 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959); *see also State v. Berberian*, 427 A.2d 1298 (R.I. 1981).

The license issued to petitioner by the Town of West Warwick was not an annual, or even a quarterly one. It was a *monthly* license and, as such, necessarily indicated regular monitoring and approval of the licensed operation. It is undisputed that the Town of West Warwick — for a period of almost six years, up to and including February 20, 1981, the date of the alleged offense — had *continuously, on a monthly basis*, renewed the license issued to the Palace Cinema pursuant to Section 5-22-5 of the Rhode Island General Laws. It is equally uncontested that throughout this long span of years the town knew that the Palace advertised and showed X-rated movies.

Under Section 5-22-5 the town was authorized to revoke the theatre's license, if any of these movies were obscene. Yet the town, month after month, year after year, renewed the license, recognizing full well that the theatre was showing sexually explicit films. It was eminently reasonable for petitioner to rely on the Town of West Warwick's ready renewals of the license as assurance that what he was doing was not proscribed. The town's six-year acquiescence in the showing of X-rated movies, without once seeking a statutorily-authorized revocation, alone would be a justifiable basis for believing that the theatre's offerings were lawful. But when the town affirmatively and repeatedly *renewed* the Palace's license *every month*, petitioner's reliance on apparent authority was incontrovertibly reasonable.

This is not to say that the Town of West Warwick had the power to authorize the showing of obscene movies. That is not the point, although prosecution after even erroneous government assurances also violates the Due Process Clause. *Raley v. Ohio*, 360 U.S. at 438-439. The point here is whether the town's practice of renewing the licenses led petitioner to believe that the town had authorized exhibition of such films and whether his reliance on this government authority was objectively reasonable. The Model Penal Code states the principle as follows:

> "*A belief* that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:. . . (b) he acts *in reasonable reliance upon* an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . (iii) *an administrative order or grant of permission*; . . . ." § 2.04(3)(b) (emphasis added).

It is worth noting that the actor's belief may be mistaken, yet remains a good defense so long as his reliance is reasonable. Thus, the fact that the Town of West Warwick may not have granted express permission to exhibit the specific films shown on February 20, 1981 is legally immaterial. If petitioner reasonably relied on the monthly license renewals as granting permission to continue showing the type of motion pictures exhibited and

advertised by the Palace Cinema for six years, then his reliance barred prosecution.

Petitioner asserted this complaint prior to trial, expressly claiming that he had relied on the town's license renewals. But the trial judge flatly rejected this proffered defense, ruling that the licenses were completely irrelevant since the town cannot license something prohibited by law. (Tr. 55-56) In affirming petitioner's conviction, the Rhode Island Supreme Court majority stated that "[i]f, in fact, defendant relied upon the issuance of these general licenses as such an official assurance, his reliance was sorely misplaced." (A 5) But this conclusion is inappropriate. If there was an issue as to whether petitioner's reliance was reasonable or not, then that was an issue for the trier of fact. *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. at 675 ("whether the reliance was reasonable under the circumstances . . . must be decided in the first instance by the trial court"). Since the trial court barred the defendant's claim, the jury was never presented with this issue. Therefore, even if *institution* of criminal proceedings against petitioner was not absolutely barred by the Due Process Clause, that clause requires a new trial so that a jury can consider a defense of reasonable reliance on government authority.

This Court should grant certiorari to decide whether a state may punish conduct similar to that which it has been licensing monthly for six years or whether it is first required to revoke or refuse to renew the license so that a person is put on notice that such continued conduct will expose him to criminal liability.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to review the judgment of the Rhode Island Supreme Court should be granted.

January 18, 1985

Respectfully submitted,

HERALD PRICE FAHRINGER, ESQ.
540 Madison Avenue
New York, New York 10022
(212) 751-1330

Attorney for Petitioner

APPENDIX

APPENDIX A

OPINION OF THE RHODE ISLAND SUPREME COURT

September 20, 1984

Supreme Court

State
v.
John J. Tavone.

No. 82-62-C.A.

NOTICE: This opinion is subject to formal revision before publication in the Rhode Island Reports. Readers are requested to notify the Supervisor of Opinion Processing, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, at Tel. 277-6588 of any typegraphical errors and the Opinion Analyst at Tel. 277-3258 for other formal errors in order that corrections may be made before the print goes to press.

September 20, 1984

Dissents begin at page 12.

Supreme Court

No. 82-62-C.A.

State :

v. :

John J. Tavone. :

OPINION

MURRAY, J. This is an appeal by the defendant, John J. Tavone, from a Superior Court conviction on one court of knowingly promoting for commercial gain an obscene motion picture in violation of G.L. 1956 (1981 Reenactment) § 11-31-1. The defendant was indicted by a Kent County Grand Jury and charges with three separate counts of violating § 11-31-1. Pretrial motions commenced on December 3, 1981. The trial began on December 4, 1981, before a justice of the Superior Court and a jury. On December 11, 1981, the jury found the defendant guilty on count 1 of the indictment.

On February 20, 1981, the date of the offense, defendant was th eowner and operator of the Palace Theater, located in the town of West Warwick. The defnedant advertised and then exhibited, at the theater, X-rated films. Sometime prior to February 1981, the theatre, had been operated by Rhode Island Films, Inc. During that time, defendant was the owner and landlord of the theater.

During the tenancy of Rhode Island Films, Inc., the theater became embroiled in a dispute with the town of West Warwick — with the town apparently attemtping to stop the showing

of X-rated movies. A civil action was commenced by the parties then operating the theater which resulted in the entry of an order temporarily restraining, inter alia, the West Warwick Chief of Police and the town council fro harassing the theater operators or from interfering with the exhibition of films at the theater. The town, which had revoked the theater's license and had refused to issue any further licenses to the theater operators, then began to issue licenses for the exhibition of films to the theater with the notation "Pursuant to Court Order No 75-262."

At some point, prior to the date of the offense, defendant assumed the operation of the theater. The defendant continued to advertise and exhibit X-rated films. Each time defendant applied for a license to exhibit films, it was issued with the same notation, "Pursuant to Court Order No. 75-262." The license that was issued for the month of February 1981, however, did not bear this notation.

On February 20, 1981, after consulting the newspaper advertisements placed by defendant to determine what filsm were to be shown at the Palace Theater that evening, two Rhode Island State Police detectives viewed two filsm in their entirety at the theater. These films were entitled "Baby Blue" and "Marschino Cherry." After viewing these two films, one of the detectives made application, supported by a detailed affidavit, for a search warrant. This affidavit graphically described two scenes from each film and briefly indicated the nature of other scenes in the films.

The detectives obtained a search warrant from a justice of the Superior court and returned to the theater on the following evening. After viewing a portion of the film exhibition to verify that the same films were being shown, the detectives seized the two films. The defendant subsequently arrived at the theater and was arrested. The defendant was indicted, tried, and convicted on count 1 — in regard to the film "Baby Blue."

Prior to trial, defendant moved for a dismissal of the indictment based uon the theory that the state was barred from bringing criminal charges against him under the law of *State v. Berberian*, R.I., 427 A.2d 1298 (1981). The defendant also moved

to suppress the seized films on the ground that there was no probable cause for the issuance of the search warrant. These motions were denied by the trial justice. The defendant contends that the trial justice's rulings upon these motions wee erroneous; therefore, he raises only these issues upon appeal to this court.

With regard to the question of whether the state was barred from instituting criminal charges against defendant, the state argues that defendant's reliance upon *Berberian* is misplaced. We agree. While the facts in *Berberian* are similar to those of the case before us, there are significant distinctions. In *Berberian* the defendants applied to the Bureau of Licenses (bureau) for the City of Providence for a license authorizing the showing of two specific films. *Id.* at , 427 A.2d at 1299. The record in that case also disclosed that upon the filing of the application, the defendants made the films available to the bureau for viewing. *Id.* The bureau issued a license to permit the showing of the films without itself viewing them. The films were exhibited by the defendants in reliance upon the bureau's actions. Subsequently, the State Police seized the films, and the defendants were ultimately indicted and charged with violating § 11-31-1. *Id.*

In *Berberian* we upheld the trial justice's dismissal of the indictments against the defendants. We found in that case that

> "the issuance of a license by the Bureau for the subject films did indeed constitute an official and express assurance from which, absent a final determination that the films were obscene, no criminal prosecutions against defendants under § 11-31-1 could attach." *Id.* at , 427 A.2d at 1301.

We also found, consequently, that the defendant had a right to rely on the license issued by the bureau.

We cannot reach the same conclusion in the present case. In *Berberian* we pointed out that through the enactment of G.L. 1956 (1976 Reenactment) § 5-22-5, the Legislature has delegated

its police power to the cities and towns. R.I. at , 427 A.2d at 1300-01. We also pointed out in that case that the relevant section of the Providence Code of Ordinances properly set forth the procedures and criteria to be followed by the bureau in accordance with § 5-22-5. R.I. at , 427 A.2d at 1301. Pursuant to § 5-22-5, the Providence ordinance gave the bureau the option of either granting the license sought by the defendant or commencing judicial proceedings to adjudge the films obscene.[1] Furthermore, the record does not disclose that defendant applied to the town council for a license to exhibit the specific films in question. Neither is there any indication that the films were made available to the town council for viewing. Given these facts, we are satisfied that the license issued to defendant by the town council was a general license to exhibit films — nothing more.

On the basis of the record before us, we cannot say that the actions of the West Warwick Town Council amounted to the same sort of official assurance as the action of the Providence Bureau of Licenses in *Berberian*. In the present case, the issuance of a general license to exhibit films did not, and could not, constitute an official assurance that any films that defendant might decide to exhibit would not be adjudged obscene. If, in fact, defendant relied upon the issuance of these general licenses as such an official assurance, his reliance was sorely misplaced.

In *Berberian*, we recognized that

> "in certain situations when an authoritative government agency or voice issues an official assurance or affirmatively misleads a defendant into believing that criminal sanctions do not apply to his behavior, no criminal sanctions will attach to the defendant because the defendant has been deprived of notice

---

[1] Section 3-12 of the code of Ordinances of the Town of West Warwick merely provides that "[n]o person shall within the town publicly, or for pay or for any profit or advantage to himself, exhibit or present or take part in any exhibition or theatrical performance or other show or performance without obtaining a license for the same from the town council."

about what conduct the government intended to make criminal in violation of due process." *Id.* at , 427 A.2d at 1301 (citing *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 93 S.Ct. 1804, 36 L. Ed. 2d 567 (1973); *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, *reh. denied*, 380 U.S. 926, 85 S. Ct. 879, 13 L. Ed. 2d 841 (1965); *Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959)).

The present case does not present such a situation. In no way can the town council be said to have affirmatively misled defendant into believing that through the issuance of a general license the town had given up in its right to challenge as obscene films that might be shown at the Palace Theater. Were we to hold otherwise, we would essentially be saying that a defendant has a right to rely upon a general license to exhibit films, issued in the absence of established procedures for determining obscenity, as a defense to a prosecution for violating § 11-31-1. This we will not do.

The defendant makes much of the fact that licenses had been issued to him with the notation "Pursuant to Court Order No. 75-262." It is defendant's contention that this notation reinforces his argument of official authorization for the exhibition of films like "Baby Blue." We agree with the trial justice that this notation adds little, if anything, to defendant's argument. The defendant was not a party to the civil action that resulted in the issuance of the temporary restraining order requiring the town, inter alia, to refrain from harassing the then operators of the theater. Furthermore, the case from which the court order originated had been dismissed wihout appeal in September 1980, several months before the date of the offense. The mere fact that the town council had previously been enjoined from not acting on applications regarding the Palace Theater, and subsequently issued licenses to defendant bearing reference to the prior court order, does not change the fact that no determination was ever made by the town council concerning the obscenity of specific films to be shown at the theater.

In light of the foregoing analysis, we find that the trial justice was correct in denying defendant's motion to dismiss.

The defendant also challenges the trial justice's denial of his motion to suppress the two films seized by the State Police. It is defendant's contention that the supporting affidavit upon which the search warrant was issued did not provide the magistrate with sufficient information from which a determination of probable cause could be made. We disagree. Even though defendant properly sets forth the requirements of the Fourth Amendment in obscenity cases, the record in the present case does not support defendant's conclusion.

It is clear that in situations in which the materials to be seized pursuant to a search warrant are presumptively under the protection of the First Amendment, the requirements of the Fourth Amendment must be adhered to strictly. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564-65, 98 S. Ct. 1970, 1981, 56 L. Ed. 2d 525, 541 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 511-12, 13 L. Ed. 2d 431, 437 (1965); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 732-33, 81 S. Ct. 1708, 1716-17, 6 L. Ed. 2d 1127, 1137 (1961); *United States v. Guarino*, 729 F.2d 864, 867 (1st Cir. 1984). In making a determination of probable cause for the issuance of a search warrant, a magistrate must concern himself with two specific elements of the warrant requirement. First, he must ensure that the items to be seized are described with particularity. *Stanford v. Texas*, 379 U.S. at 485, 85 S. Ct. at 511-12, 13 L. Ed. 2d at 437; *United States v. Guarino*, 729 F.2d at 867. Second, a magistrate must be certain that the affidavit provides him with enough detail to enable him "to focus searchingly on the question of obscenity." *Marcus v. Search Warrant of Property*, 367 U.S. at 732, 81 S. Ct. at 1716, 6 L. Ed. 2d at 1136. In short, "[w]here presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. at 564, 98 S. Ct. at 1981, 56 L. Ed. 2d at 541.

In the present case, defendant argues that the affidavit fails to inform the magistrate that the two scenes described were

depicted in a patently offensive way. He also argues that the affidavit does not indicate the total number of scenes showing the type of explicit sexual conduct described in the affidavit. In addition, defendant claims that the affidavit fails to inform the magistrate of the duration of the two scenes described from each film and therefore provided him with insufficient information upon which to make a determination that there was probable cause to find that the films, taken as a whole, were obscene.

We are satisfied that the affidavit in question was specific and detailed enought to allow the magistrate to "focus searchingly upon the question of obscenity."[2]

---

[2]The affidavit is as follows:

"I, Detective Anthony M. Pesare, do depose and say:

"That I am a member of the Rhode Island State Police and have been continuously employed in this capacity for the past six years. I am presently assigned to the Detecive Division with other members of the Rhode Island State Police.

"As a result of a complaint received at R.I. State Police Headquarters about the Palace located at 85 Washington St., West Warwick R.I. showing pornagraphic movies, your affiant and Detective Gerald A. Prendergast were assigned, yesterday, February 20, 1981 to attend and view two x-rated films at the movie theatre the Palace.

"At approximately 8:07 P.M. on February 20, 1981 your affiant and Det. Gerald A. Prendergast each paid a $5.00 admission fee and entered the theatre. We received no ticket stub for our admission to the show. We then proceeded to the movie theatre which billed two movies 'Baby Blue' and 'Maraschino Cherry.'

"Your affiant entered the show where a short subject was just ending. Upon the completion of the short, a film entitled 'Baby Blue' starring Gina Harow was shown at 8:18 P.M. The plot revolved around two couples and a young girl and her boyfriend. A scene viewed by your affiant took place on the couch of a house. A male and a female were engaged in various sexual activity. The female performed fellatio on the erect penis of the male. The male then performed cunnilingus on the female and the two then engaged in sexual intercourse which culminated in the male withdrawing his penis from the vagina of the female and ejaculating on her stomach.

"In another scene from 'Baby Blue' your affiant observed two females engaged in homosexual activities. The two females performed cunnilingus on each other on a floor near a fireplace. During the scene the two also engaged in

Contrary to defendant's argument, the Superior Court justice who issued the search warrant could reasonably find, on the basis of the affidavit, probable cause under all three elements of the standard set forth in *Miller v. California*, 413 U.S. 15,

---

mutual masturbation. This activity took place under the watchful eye of a male character in the film.

"Your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation.

"At the end of the first film a second movie entitled 'Maraschino Cherry' was shown. The plot revolved around a woman who owns a house of pleasure in New York City. She is visited by her younger sister and proceeded to show her the ins and outs of running such a business.

"One scene involves two male customers of the establishment who are with the younger sister. The younger sister performs fellation on both of them. She then performs fellatio on one, while the other places his erect penis into her vagina from the rear.

"Another scene takes place in the basement of the house and involves four women. One of the women is kneeling on a metal table where she is forced to hold her arms outstretched and balance two glasses of liquid. Her breasts are suspended over a hot plate. One of the females then lubricates her anus with a large quantity of K-Y jelly. She then inserts a dildo into the anus of the female. After moving the dildo in and out of the anus she removes it and inserts a larger dildo into the anus. She moves this imitation penis in and out of the anal cavity before she finally removes it.

"Your affiant viewed many other scenes in this movie which were sexual in nature and showed various acts of intercourse, fellatio and cunnilingus.

"After viewing 'Baby Blue' and 'Maraschino Cherry' in their entireties your affiant and Det. Gerald A. Prendergast left the theatre at 10:50 P.M. on February 20, 1981.

"Therefore, it is your affiant's belief that taken as a whole the above mentioned motion pictures/movies are obscene as defined in 11-31-1 of the General Laws of Rhode Island, 1956, as amended, in applying contemporary community standards. Each motion picture/movie taken as a whole appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and in which taken as a whole, lacks serious value.

"Therefore it is your affiant's request that permission be granted to search and seize the two above mentioned motion pictures/movies and the business records relating to the aforementioned motion pictures/movies."

24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419, 431 (1973),[3] and § 11-31-1, that the films taken as a whole were obscene.

A reading of the affidavit submitted by the State Police detective makes it very clear that the issuing magistrate could have reasonably found probable cause that the scenes described were depicted in a patently offensive way. The affidavit related these passages in graphic detail, leaving nothing to the imagination. Furthermore, as the state points out, defendant concedes that a magistrate could conclude from the scenes described in the affidavit that both films met the second prong of the *Miller* test.

Regarding the defendant's assertion that the affidavit was deficient in that it only related to a small portion of the film, it seems clear that these scenes "contained successive acts which common sense dictates would require several minutes to perform and thus would consume a substantial portion of the entire film* * *." *United States v. Middleton*, 599 F.2d 1349, 1359 (5th Cir. 1979). The affiant also stated that he reviewed many other scenes showing various explicit sexual acts. Given the relatively short length of the films, we are satisfied that the affidavit provided the magistrate with a sufficient understanding of each of the films. We find, therefore, that the trial justice did not err in denying defendant's motion to suppress the films seized.

For the reasons stated, the defendant's appeal is denied and dismissed, the judgment of conviction entered below is hereby affirmed, and the case is remanded to the Superior Court.

CHIEF JUSTICE BEVILACQUA, with whom Associate Justice Kelleher joins, dissenting. I must respectfully dissent from the majority's findings on the question of whether the state was barred from instituting criminal charges against the defendant.

In *State v. Berberian*, R.I. , , 427 A.2d 1298, 1301, (1981), we held that

> "when an authoritative government agency or voice issues an official assurance or affirmatively misleads a defendant into believing that criminal sanctions do not apply to his behavior, no criminal sanctions will attach to the defendant because the defendant has

> been deprived of notice about what conduct the government intended to make criminal in violation of due process."

The defendant sought and was granted a license to show motion pictures at his theater month after month by the West Warwick Town Council. It is true, as the majority points out, that the February 1981 license granted by the town council was not a license to show the two specific films in question. Nevertheless, it is abundantly clear that the town council was aware that defendant was showing X-rated movies at his theater. The defendant as well as the previous owner had been involved in a longstanding dispute with town officials over the showing of X-rated films. Moreover, defendant advertised his theater's showing of X-rated films on a weekly basis in the newspaper. Furthermore, the order temporarily restraining the West Warwick Chief of Police and the town council from harassing or interfering with the exhibition of motion-picture films at the theater was no longer in effect when defendant was granted a license to show films for the month of February 1981. Thus, as the majority correctly points out, if was of no consequence whether the license was issued "[p]ursuant to Court Order 75-262." Not bound by any court order and fully aware that defendant was showing X-rated movies at his theater, the town council could have asked to view the films that defendant planned to show or could have commenced proceedings under G.L. 1956 (1976 Reenactment) § 5-22-5. Instead, the town council chose to issue defendant a license to show what the town knew to be X-rated movies, thereby affirmatively misleading defendant to believe that his conduct in showing X-rated films met with the approval of the town council.

Additionally, the majority contends that the present case is distinguishable from *Berberian* in that in present case the town of West Warwick had not adopted a procedure for viewing films and making a determination whether to grant a license or to commence proceedings to adjudge films obscene. What the majority fails to explain is why the town council did not follow the procedure set forth in § 5-22-5, which provides that where

> "a license for any particular performance, show or exhibition [is sought] and the town council, [or] the board of police commissioners *** is of the opinion that the said license should not be granted on the ground that the said performance, show or exhibition is obscene, the said town council, [or] the board of police commissioners *** shall within forty-eight (48) hours of the filing of such application, either grant the license sought or commence a suit *** by the filing of a complaint wherein shall be contained prayers that the said performance, show or exhibition be adjudged obscene and that the *** [applicant] *** be permanently enjoined from presenting or conducting it in the particular city or town."

The town council never instituted proceedings pursuant to § 5-22-5, as it should have if it believed that the defendant was showing obscene films. As a result, I feel that the issuance of the license by the West Warwick Town Council gave the defendant sufficient assurance for believing that the showing of the films in question was conduct for which he could not be criminally sanctioned.

I would therefore sustain the defendant's appeal, vacate the judgment of conviction, and grant the motion to dismiss.

APPENDIX B

ORDER ON REHEARING

Supreme Court

No. 82-62-C.A.

State :

v. :

John J. Tavone :

ORDER

The petition to reargue is denied.

Entered as an Order of this Court this 21st day of November, 1984.

By Order,

/s/ _____
Walter J. Kane
Clerk

THEATRE LICENSE ISSUED BY
TOWN OF WEST WARWICK

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Town of West Warwick

TO WHOM IT MAY CONCERN:

In consideration of the total sum shown below and paid to the Town Clerk, whose receipt must be hereon affixed, the Town of West Warwick grants on the following—

A Town Ordinance Provides that this Must be Displayed in a Conspicuous Place.

Date February 5, 1981

To Palace Book Shop
John Tavone
d.b.a. Palace Cinema
85 Washington Street

№ 1563

The Following License(s): West Warwick

THEATRE (Films)	$ 12.50
February 2 thru February 28, 1981	
TOTAL →	$ 12.50

This license is granted subject to all provisions contained in G. L. 1956 as amended and all Town Ordinances relative thereto.

Date Issued February 5, 1981

EXPIRES ▶ February 28, 1981

(SURRENDER OF LICENSE SHALL NOT ENTITLE LICENSEE TO ANY REFUND.)

Darleen M. Regnacie
Deputy Town Clerk

TOWN CLERK'S COPY

BEST AVAILABLE COPY

APPENDIX D

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

I, Detective Anthony M. Pesare, do depose and say:

That I am a member of the Rhode Island State Police and have been continuously employed in this capacity for the past six years. I am presently assigned to the Detective Division with other members of the Rhode Island State Police.

As the result of a complaint received at R.I. State Police Headquarters about The Palace located at 35 Washington St. West Warwick R.I. showing pornographic movies, your affiant and Detective Gerald A. Prendergast were assigned, yesterday, February 20, 1981 to attend and view two x-rated films at the movie theatre The Palace.

At approximately 8:07 P.M. on February 20, 1981 your affiant and Det. Gerald A. Prendergast each paid a $5.00 admission fee and entered the theatre. We received no ticket stub for our admission to the show. We then proceeded to the movie theatre which billed two movies "Baby Blue" and "Maraschino Cherry."

Your affiant entered the show where a short subject was just ending. Upon the completion of the short, a film entitled "Baby Blue" starring Gina Harow was shown at 8:18 P.M. The plot revolved around two couples and a young girl and her boyfriend. A scene viewed by your affiant took place on the couch of a house. A male and a female were engaged in various sexual activity. The female performed fellatio on the erect penis of the male. The male then performed cunnilingus on the female and the two then engaged in sexual intercourse which culminated in the male withdrawing his penis from the vagina of the female and ejaculating on her stomach.

In another scene from "Baby Blue" your affiant observed two females engaged in homosexual activities. The two females performed cunnilingus on each other on a floor near a fireplace. During the scene the two also engaged in mutual masturbation. This activity took place under the watchful eye of a male character in the film.

Your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation.

At the end of the first film a second movie entitled "Maraschino Cherry" was shown. The plot revolved around a woman who owns a house of pleasure in New York City. She is visited by her younger sister and proceeds to show her the ins and outs of running such a business.

One scene involves two male customers of the establishment who are with the younger sister. The younger sister performs fellatio on both the men. She then performs fellatio on one, while the other places his erect penis into her vagina from the rear.

Another scene takes place in the basement of the house and involves four women. One of the women is kneeling on a metal table where she is forced to hold her arms outstretched and balance two glasses of liquid. Her breasts are suspended over a hot plate. One of the females then lubricates her anus with a large quantity of K-Y jelly. She then inserts a dildo into the anus of the female. After moving the dildo in and out of the anus she removes it and inserts a larger dildo into the anus. She moves this imitation penis in and out of the anal cavity before she finally removes it.

Your affiant viewed many other scenes in this movie which were sexual in nature and showed various acts of intercourse, fellatio and cunnilingus.

After viewing "Baby Blue" and "Maraschino Cherry" in their entireties your affiant and Det. Gerald A. Prendergast left the theatre at 10:50 P.M. on February 20, 1981.

Therefore, it is your affiant's belief that taken as a whole the above mentioned motion pictures/movies are obscene as defined in 11-31-1 of the General Laws of Rhode Island, 1956, as amended, in applying contemporary community standards. Each motion picture/movie taken as a whole appeals to the

prurient interest in sex, which portrays sexual conduct in a patently offensive way, and in which taken as a whole, lacks serious value.

Therefore, it is your affiant's request that permission be granted to search and seize the two above mentioned motion pictures/movies and the business records relating to the aforementioned motion pictures/movies.

/s/ _____
Anthony M. Pesare
Detective
Rhode Island State Police

_____ ,SC

Subscribed and sworn to before me on this _____ day of February 1981, in _____ County of _____, State of Rhode Island and Providence Plantations.

Before me,

/s/ _____
Judge

Office - Supreme Court, U.S
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1179

In The
Supreme Court of the United States
October Term, 1984

JOHN J. TAVONE,
Petitioner,

vs.

STATE OF RHODE ISLAND,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATE OF RHODE ISLAND
by its attorney
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ATTORNEY GENERAL

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March, 1985

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Now comes the Respondent, the State of Rhode Island, and prays that the Petition for a Writ of Certiorari to the Supreme Court of Rhode Island be denied.

SUMMARY OF ARGUMENT

I. The Rhode Island Supreme Court correctly concluded that the warrant was proper.

II. The Exclusionary Rule must not be applied in this case.

III. Petitioner's conviction does not violate the due process clause.

STATEMENT OF THE CASE

For the purposes of the within Petition, Respondent agrees to the statement of facts set out in the Petitioner's petition.

ARGUMENT

I. The Rhode Island Supreme Court Correctly Concluded That The Warrant Was Proper.

In *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968), a police officer obtained a warrant based upon the bare con-

clusory allegation that certain films were obscene. This Court, in a brief *per curiam* order, reversed the defendant's conviction with the following observation:

> "[W]e need not decide in this case whether the [magistrate] should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions was not a procedure designed to focus searchingly on the question of obscenity," . . . and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.* at 637 (citations omitted).

In the instant case Petitioner asks this Court to resolve the question left unanswered in *Lee Art.* The Respondent recognizes that this is an issue that has never been specifically resolved by this Court. Nevertheless, Respondent submits that the courts below properly applied then law which is readily discernible from this Court's opinions in this area. Thus, it is Respondent's view that the within case is simply unworthy of this Court's discretionary certiorari jurisdiction.

In *Miller v. California,* 413 U.S. 15 (1973), this Court reiterated the view that obscene material is not protected by the First Amendment. *Id.* at 23. The *Miller* Court promulgated specific guidelines to be used in determining whether a particular work is legally obscene:

> "The basic guidelines for the trier of the fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically de-

> fined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

The Rhode Island General Assembly was fully cognizant of the *Miller* test when it enacted the State obscenity statute. Section 11-31-1 of the Rhode Island General Laws defines obscenity as follows:

> "In determining whether or not a show, motion picture, performance, photograph, book, magazine, or other material is obscene the trier of fact must find
>
> (a) that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest and
>
> (b) that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by this chapter and
>
> (c) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. R.I. Gen. L. (1981 Reenactment) Sec. 11-31-1.

It is noteworthy that Petitioner in this case does not claim that the *Miller* standard was improperly explained to the jury. Nor does he allege that the evidence was insufficient to convict in accordance with the Rhode Island statute. By declining to pursue such arguments, Petitioner essentially concedes that the film seized was obscene. The within Petition accordingly focuses not upon the film itself but upon the warrant issued for its seizure. In this regard Petitioner claims that the Superior Court Justice who issued the warrant lacked sufficient information upon which to find probable cause for seizure of the film. An examination of this Court's decision in this area reveals that Petitioner's claim lacks merit.

In *Roaden v. Kentucky,* 413 U.S. 496 (1973), a county sheriff visited a drive-in theater to view a certain film entitled "Cindy and Donna". The sheriff concluded that the film was obscene. At the conclusion of the showing he arrested the manager of the theater and seized a copy of the film. The defendant's motion to suppress was denied and defendant was convicted. This Court, on a writ of certiorari, concluded that the warrantless seizure of the film violated the Fourth Amendment. The Court noted that the Fourth Amendment protects against unreasonable seizures. *Id.* at 501. In measuring reasonableness, a reviewing court necessarily considers the nature of the materials seized. Books or films are in a special category because their seizure implicates values protected by the First Amendment as well as the Fourth Amendment:

> "[M]aterial seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." *Id.* at 504.

On the same day that *Roaden* was decided, this Court issued its opinion in *Heller v. New York,* 413 U.S. 483 (1973). The Court in *Heller* upheld the seizure of an obscene film pursuant to a warrant issued by a magistrate who had visited the theater for the purpose of viewing the film. As with all warrants, the warrant in *Roaden* issued without any adversarial proceedings. This Court saw no reason to require a pre-warrant adversary hearing.

The Court concluded that appropriate post-seizure procedures adequately protect the defendant's rights:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversarial proceeding is available at the request of any interested party, the seizure is constitutionally permissible." *Id.* at 492.

This Court confronted a slightly different problem in *Lo-Ji Sales v. New York,* 442 U.S. 319 (1979). In that case the police delivered to a magistrate two films which had been purchased at an adult book shop. The magistrate viewed the films, concluded that they were obscene, and issued a warrant for additional copies of the same films. The magistrate's role apparently did not end with his signing of the warrant. Police officers invited the magistrate to join them when they executed a warrant in order to make an independent determination regarding other allegedly obscene items on display at the store. What ensued was an all-day visit to the bookstore by the magistrate and the police. The magistrate apparently viewed films and books by the dozens, spending barely seconds in concluding that each item was obscene. At the end of the day the police inventoried the items seized. Despite the fact that the seizure was a *fait accompli,* the police amended the search warrant to include the hundreds of books and films that they had seized.

On these facts, this Court concluded that this highly intrusive search and seizure contravened the Fourth Amendment's proscription against unreasonable searches and seizures. First, the Court reasoned that the warrant as originally drawn was far too general in its scope. The

police in executing the warrant treated it as a general warrant in utter disregard for the Fourth Amendment's particularity requirement. Moreover, this Court found the role of the magistrate to be an absolute abdication of "that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." *Id.* at 326 (citing *Collidge v. New Hampshire,* 403 U.S. 443, 449 (1971)). In commenting upon the magistrate's role in the entire escapade, this Court reasoned in *Lo-Ji,*

> "[T]he objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. Once in the store, he conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer." 442 U.S. at 327.

Several principles are readily discernible from the foregoing cases. First, a bare conclusory allegation that certain materials are obscene will never provide probable cause for issuance of a warrant. *Lee Art Theatre v. Virginia supra; see Roaden v. Kentucky, supra.* Where the issuing magistrate actually views the film, he may grant a warrant based upon his observations. *Heller v. New York, supra.* On the other hand, any magistrate who undertakes to view the materials in person must strictly limit his involvement at the scene. *Lo-Ji Sales v. New York, supra.*

Viewed against this backdrop, Respondent submits that there was no defect in the warrant issued in the case at bar. The films involved were described in explicit de-

tail by Rhode Island State Police Detective Anthony M. Pesare in his application for a warrant. With regard to the film "Baby Blue" Detective Pesare stated:

> "The plot revolved around two couples and a young girl and her boyfriend. A scene viewed by your affiant took place on the couch of a house. A male and a female were engaged in various sexual activity. The female performed fellatio on the erect penis of the male. The male then performed cunnilingus on the female and the two then engaged in sexual intercourse which culminated in the male withdrawing his penis from the vagina of the female and ejaculating on her stomach."
>
> "In another scene from 'Baby Blue' your affiant observed two females engaged in homosexual activities. The two females performed cunnilingus on each other on a floor near a fireplace. During the scene the two also engaged in mutual masturbation. This activity took place under the watchful eye of a male character in the film."
>
> "Your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation." (Petitioner's App. 15-16).

The Rhode Island Supreme Court concluded that this affidavit alleged sufficient probable cause to justify issuance of a warrant. The court relied upon *United States v. Middleton,* 599 F.2d 1349 (5th Cir. 1979), in reasoning that such an affidavit need not describe each and every sexual act in a film in order to establish probable cause:

> "[I]t seems clear that these scenes 'contained successive acts which common sense dictates would require several minutes to perform and thus would consume a substantial portion of the entire film . . .' The af-

> fiant also stated that he reviewed many other scenes showing various explicit sexual acts. Given the relatively short length of the films, we are satisfied that the affidavit provided the magistrate with sufficient understanding of each of the films." *State v. Tavone,* 482 A.2d 693, 698 (R.I. 1984) (citation omitted).

The Respondent submits that the Rhode Island Supreme Court was correct when it concluded that the affidavit supplied probable cause for issuance of the warrant. This Court has recognized the need to distinguish between the quantum of evidence necessary to obtain a warrant and the degree of proof essential to sustain a criminal conviction. A magistrate reviewing a warrant application must apply a standard significantly less stringent than proof beyond a reasonable doubt. As Justice Rehnquist wrote in this Court's opinion in *Illinois v. Gates,* 103 S.Ct. 2317 (1983).

> "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Id.* at 2330 (citations omitted).

The affidavit in this case left little to the imaginaton. It reported no fewer than five sexual acts in explicit detail. The affiant reported that these acts and others were repeated many times in this short film. Petitioner fails to draw this Court's attention to anything of significance or value that was omitted from the affidavit. Given the proper level of detail in the affidavit, Respondent submits that the Rhode Island Supreme Court properly concluded

that it was sufficient. Unless this Court is prepared to adopt a *per se* rule requiring an issuing magistrate to prescreen all allegedly obscene materials, the Petition for certiorari must be denied.

II. The Exclusionary Rule Must Not Be Applied In This Case.

This Court announced the Fourth Amendment exclusionary rule in *Weeks v. United States,* 232 U.S. 383 (1914), and *Mapp v. Ohio,* 367 U.S. 643 (1961). The Court has recently recognized that the philosophical underpinnings of the exclusionary rule sometimes will not support its application to exclude reliable, probative evidence obtained in technical violation of the Fourth Amendment. *Massachusetts v. Sheppard,* 104 S.Ct. 3424 (1984); *United States v. Leon,* 104 S.Ct. 3405 (1984). The principles endorsed in *Sheppard* and *Leon* weigh heavily against application of the exclusionary rule in this case.

In *Leon,* this Court recognized that adherence to the truth-finding role of judges and jurors sometimes requires that the propriety of the exclusionary sanction be measured in light of the magnitude of the alleged police misconduct:

> "Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *United States v. Leon,* 104 S.Ct. at 3405 (1984).

In both *Sheppard* and *Leon* this Court held that police officers had reasonably relied upon facially valid warrants. In view of this reasonable reliance, the Court held

that the exclusionary rule could not apply. Respondent submits that a similar approach is proper in this case. A Justice of the Superior Court considered the warrant application to be proper. Later, another Justice agreed and denied the motion to suppress. Moreover, the Rhode Island Supreme Court held that the warrant was adequate. In light of this substantial authority in support of the warrant, the police officer's reliance upon the warrant was clearly proper.

Given the clear evidence that the police acted in good faith, *Sheppard* and *Leon* preclude application of the exclusionary rule. Accordingly, the writ of certiorari must be denied.

III. Petitioner's Conviction Does Not Violate The Due Process Clause.

Petitioner argues that his conviction should have been barred under the Due Process clause. His theory revolves around certain licenses issued by the Town of West Warwick for the general exhibition of films at his theater. These licenses, Petitioner theorizes, constituted an affirmative representation by town officials that he would not be prosecuted for showing obscene films. Based on this theory, Petitioner alleges that the trial judge erroneously refused to dismiss the indictment. Failing this argument, Petitioner alleges that the issuance of the licenses was improperly kept from the jury. This latter contention is nothing less than an attempt to mislead this Honorable Court. An examination of the trial transcript reveals that licenses were admitted as exhibits at pages 105 and 108. Thus, Petitioner's assertion that the licenses were never before the jury is patently false. Moreover, Petitioner's

theory of "reliance" as a basis for dismissal of the indictment is simply wrong.

An examination of the license in issue (Petitioner's App. C) reveals the following language:

> "This license is granted subject to all provisions contained in G.L. 1956 as amended and all Town Ordinances relative thereto." (Pet. App. C).

Thus, from the very face of the license, Petitioner was on notice that he was absolved of none of the provisions of the General Laws.

Petitioner places heavy reliance upon the case of *State v. Berberian,* 427 A.2d 1298 (R.I. 1981). Respondent agrees that *Berberian* is most instructive. In *Berberian* the defendant had applied for and obtained a license for the showing of a specific film. After receiving the license, defendant was prosecuted criminally for showing the very film that city officials had authorized him to show. On these facts, the Rhode Island Supreme Court concluded that the defendant had a reasonable right to rely on the permit issued in that case.

Berberian is clearly distinguishable from the instant case. In this case Petitioner obtained a broad license for the exhibition of films. The license did not refer to any specific film, nor did Petitioner receive any assurance that he could show obscene films without prosecution. Indeed, the license clearly alerted Petitioner that he remained subject to the General Laws of Rhode Island. On this state of affairs Respondent suggests that the conclusion of the Rhode Island Supreme Court was clearly correct:

> "In no way can the town council be said to have affirmatively misled defendant into believing that

through the issuance of a general license the town had given up its right to challenge as obscene films that might be shown at the Palace Theatre." 482 R.I. at 696.

Petitioner's theory is simply erroneous. States grant licenses for myriad activities such as driving, construction, and the practice of law. The recipents of such licenses remain fully subject to the laws of the jurisdiction. For example, a licensed driver who violates the traffic laws is subject to prosecution. He cannot claim that the license confers immunity from prosecution. Yet this is the logical extension of the theory that Petitioner proposes. Respondent submits that the theory is wrong and that the Petition for certiorari must be denied.

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CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari must be denied.

STATE OF RHODE ISLAND

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